In The
Supreme Court of the United States

No. 242

VERNIE BAILESS, County Treasurer, Caddo County, Oklahoma, and W. B. COLEMAN, Assessor of Caddo County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS OF CADDO COUNTY, OKLAHOMA, composed of TED A. JONES, FRANK DUNCAN and GEORGE D. NIXON,

Petitioners,

VERSUS

JUANA PAUKUNE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF

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JULY, 1952.

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TO THE SUPREME COURT OF THE UNITED STATES:

The petitioners, above named, respectfully pray for a Writ of Certiorari to the Supreme Court of the State of Oklahoma to review a final decision of said court

rendered April 29, 1952, in a case styled "*Vernie Bailess, Co. Treas. et al., Plaintiffs in Error* v. *Juana Paukune, Defendant in Error*" and Numbered 34547 in said court.

In its decision, a copy of which appears at Pages 100-108 of the certified copy of the record filed herewith and as Appendix I to the Brief in support of this Petition, the Supreme Court of Oklahoma held that where land is allotted by Trust Patent under the General Allotment Act of February 8, 1887, the restrictions against alienation imposed by said Act run with the land and the interest of a non-Indian "heir" of an allottee is impliedly exempt from ad valorem taxation during the trust period, and that for said reason the District Court of Caddo County, Oklahoma, properly enjoined the petitioners as the tax officials of said county and State, from selling the interest of such a devisee (Juana Paukune) in satisfaction of delinquent ad valorem taxes and from levying ad valorem taxes in the future on such an interest. The basis of the decision, which purports to be based upon decisions of this Court, appears in the three paragraphs of the syllabus which we quote:

> "The restrictions under the General Allotment Act and the amendment thereto, February 8, 1887, c. 119, §5, 24 Stat. 389 (25 U.S.C.A. 348), run with the land and are applicable to it, not only in the hands of the allottee, but of his heirs as well, regardless of whether the heirs are of Indian blood or not.
>
> "Interest of heir in land allotted by Trust Patent under General Allotment Act, February 8, 1887,

c. 119, §5, 24 Stat. 389 (25 U.S.C.A. 348), is not subject to ad valorem taxes during trust period.

"The undertaking of the United States Government in Trust Patent issued pursuant to General Allotment Act, February 8, 1887, c. 119, §5, 24 Stat. 389 (25 U.S.C.A. 348), is to convey the lands at the end of the trust period free of all charge or encumbrance and imposes an obligation to keep the lands free from the burden or charge of state taxation, as well as of every other encumbrance."

STATEMENT OF THE FACTS AND OF THE PROCEEDINGS

On August 25, 1901, a Trust Patent was issued to an Apache Indian by the name of Pau-kune, which patent covered one hundred sixty acres of land located in what is now Caddo County, Oklahoma (R. 38). The allotment was made under the terms and provisions of the General Allotment Act of February 8, 1887, 24 Stat. 389.

In 1911, Pau-kune married the respondent, Juana Paukune (R. 52).

In 1919, Pau-kune died testate. His will was duly probated by the proper Federal authorities and an undivided one-third interest in the above referred to allotment passed to Juana Paukune, his surviving non-Indian spouse as a devisee under his will and not as an heir, and the remaining undivided two-thirds interest passed to Jose Paukune, a son of Juana and Pau-kune (R. 65-66).

Juana Paukune is not an Indian; she is by birth and citizenship a Mexican (R. 51 and 71).

The only title ever issued to Pau-kune was the aforesaid Trust Patent and Juana Paukune has never received a fee patent to her undivided one-third interest. The trust period originally provided for in the General Allotment Act has from time to time been extended.

The Secretary of the Interior has for many years construed the General Allotment Act and *Levindale Lead & Zinc Co.* v. *Coleman*, 241 U.S. 432, as freeing allotted lands from all restrictions upon same passing to a non-Indian devisee or heir. See R. 76-77 and letter appearing at Appendix II of the Brief in support hereof.

In 1947, Juana Paukune's undivided one-third interest in Pau-kune's allotment was assessed for ad valorem taxes in the amount of $21.33. Upon her failure and refusal to pay the taxes so assessed, her interest was advertised for sale. She thereupon instituted an action in the District Court of Caddo County, Oklahoma, to enjoin the sale and the further levy of ad valorem taxes against her interest upon the theory that title thereto was in the United States Government and for such reason same was impliedly exempt under the United States Constitution as a Federal instrumentality from taxes.

The action so instituted in the District Court of Caddo County, Oklahoma, was styled "*Juana Paukune Plaintiff* v. *Vernie Bailess, County Treasurer et al., Defendants*," and Numbered 15445 in said court (R. 10).

The first and second paragraphs of the Petition filed in No. 15445 read as follows:

"1. That she is the owner of the beneficial interest in and to an undivided 1/3 interest in and to the following described land located in Caddo County, State of Oklahoma, to-wit:

> Southeast Quarter of Southwest Quarter (SE1/4 SW1/4) and Southwest Quarter of Southeast Quarter (SW1/4 SE1/4), Sec. 3, and North Half of Northeast Quarter (N1/2 NE1/4) of Sec. 10, Township 5 North, Range 9 West of I.M., containing 160 acres,

as evidenced by a certificate called a Trust Patent, #951, issued on the 25th day of August, 1901, issued by William McKinley, President of the United States, and which is recorded in Volume 82 at Page 447 of the records of the General Land Office of the United States; that a copy of said Trust Patent is attached hereto marked plaintiff's Exhibit 1 and made a part of this petition as fully as if set out herein *verbatim;* that the trust period mentioned in said Trust Patent has been extended pursuant to law and said land is being held by the United States in trust for the sole use and benefit of this plaintiff who is the wife of Pau-kune who died about 1919 leaving a will; that the plaintiff inherited an undivided 1/3 interest in and to said allotment; that the United States possesses a supervisory control over the land which is held by the United States for the sole use and benefit of the allottee and his heirs throughout the original or any extended period of restriction (R. 11).

"2. That Title 25 U.S.C.A. 348 provides that at the expiration of said trust period the United States will convey said lands by patent to said Indian or his heirs in fee discharged of said trust and free of all charge or incumbrance whatsoever; that said trust period has not expired and said lands are

non-taxable under the laws of the United States; that no final patent has been issued" (R. 11-12).

The petitioners filed an Answer in No. 15445 and therein alleged that Juana Paukune was a non-Indian and for such reason her interest in Pau-kune's allotment was not exempt from ad valorem taxes (R. 27-28).

Following a trial on the merits on November 21, 1949, the District Court of Caddo County rendered Judgment enjoining the sale of Juana Paukune's interest for delinquent 1947 ad valorem taxes and also enjoined the further levy of ad valorem taxes against her interest during the trust period (R. 87-91). The Judgment so rendered reads in part as follows:

> "* * * that said lands are non-taxable under the laws of the United States and the State of Oklahoma and that the United States owns the fee simple title in and to said land and that no final patent has ever been issued covering the fee simple title to said lands and that said lands are restricted lands" (R. 90).

The defendants filed a Motion for New Trial and upon same being overruled perfected an appeal to the Supreme Court of Oklahoma in connection with which appeal the decision of April 29, 1952, heretofore referred to, was handed down.

The defendants then filed a Petition for Rehearing (R. 109-110) which was denied May 27, 1952 (R. 111), following which action defendants sought (R. 112-113) and obtained a stay of the Mandate and Judgment (R. 114) and then caused to be filed in this Court

a certified copy of all proceedings had in the trial court and in the Supreme Court of Oklahoma.

STATEMENT OF JURISDICTION

The issue presented is whether or not the United States Government holds title to, or such an interest in Juana Paukune's undivided one-third interest in Paukune's allotment which she took as Pau-kune's non-Indian devisee as would render said interest impliedly exempt under the Constitution of the United States from ad valorem taxation as a Federal instrumentality, which issue is a Federal question that has been present in the instant case from its inception.

As suggested by our statement of the issue here presented, there is drawn into consideration the Constitution of the United States and there is also drawn into consideration the General Allotment Act of February 8, 1887 (24 Stat. 389), and amendments thereto, and Sec. 15.1, Title 68, O.S. 1951. Under the provisions of said Section of the Oklahoma law an ad valorem tax is admittedly imposed on Juana Paukune's undivided one-third interest in Pau-kune's allotment unless said interest is impliedly exempt from said tax as a Federal instrumentality.

The portion of the General Allotment Act drawn into direct consideration is Sec. 5, the first two paragraphs of which read as follows:

"That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period.

"And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Section 15.1, Title 68, O.S. 1951, *supra*, reads as follows:

"All property in this State, whether real or personal, except that which is specifically exempt by law, and except that which is relieved of ad valorem taxation by reason of the payment of an in lieu tax, shall be subject to ad valorem taxation."

This Court has jurisdiction of this proceeding under Sec. 1257, Title 28, U.S.C.A.

QUESTIONS PRESENTED

The review prayed for by this Petition will present the following general question:

> **Is the interest of a non-Indian devisee or heir in lands allotted under the General Allotment Act impliedly immune under the Constitution of the United States from ad valorem taxes as a Federal instrumentality?**

In considering this general question the following questions are presented:

(a) Do the provisions of the 5th Section of the General Allotment Act to the effect that the United States will hold title to lands allotted thereunder in trust for the Indian allottee and his heirs apply to non-Indian devisees?

(b) Do the provisions of the 5th Section of the General Allotment Act which in effect restrict as to alienation the lands allotted thereunder in the hands of the Indian allottee and his heirs apply to a non-Indian devisee?

(c) Assuming that the interest of a non-Indian devisee in lands allotted under the General Allotment Act is restricted against alienation, does this render the interest a Federal instrumentality and impliedly exempt as such from ad valorem taxes?

(d) Is the following quoted rule laid down in *Lewindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, 437, applicable to lands allotted under the

General Allotment Act as well as those allotted under the Osage Allotment Act, which was the Act that was directly involved in the *Levindale case?:*

> "The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians — wards of the United States. The establishment of restrictions against alienation 'evinced the continuance to this extent, at least, of the guardianship which the United States had exercised from the beginning.' (Citing cases.) This policy did not embrace white men—persons not of Indian blood — who were not as Indians under national protection, although they might inherit lands from Indians; and, with respect to such persons, it would require clear language to show an intent to impose restrictions."

(e) Is *Childers* v. *Beaver*, 270 U.S. 355, upon which case the Supreme Court of Oklahoma in part based its decision in the instant case, the law today in view of the fact that the case was overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376; *Oklahoma Tax Commission* v. *U. S.*, 319 U.S. 598, 603, and *West* v. *Oklahoma Tax Commission*, 334 U.S. 717?

REASONS FOR ALLOWANCE OF WRIT

Petitioners, as reasons for allowance of Writ of Certiorari, allege as follows:

1. The Supreme Court of Oklahoma has decided an important question of Federal law, to-wit:

Is the interest of a non-Indian devisee or heir in land allotted under the General Allotment Act impliedly im-

mune under the Constitution of the United States from ad valorem taxes as a Federal instrumentality contrary to this Court's decisions in *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432; *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376; *Oklahoma Tax Commission* v. *U. S.*, 319 U.S. 598, 603; *Indian Territory Illuminating Oil Co.* v. *Board of Equalization of Tulsa County, Oklahoma*, 288 U.S. 325, 328, and *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 350?

2. If the status of a non-Indian's interest in lands allotted under the General Allotment Act is in fact different from that in lands allotted under other Allotment Acts, then this Court should decide and settle the question and thusly resolve the conflict that exists in the Supreme Court of Oklahoma's opinion in the instant case and those of several of the Circuit Courts of Appeal. For example in *Unkle* v. *Willis* (C.C.A. 8), 281 F. 35, the court held that the *Levindale Co. case* applied to "all Indian allotments" and such is the rationale of a number of other opinions cited in the Brief in support hereof.

Your petitioners further show that the Supreme Court of Oklahoma is the highest court of said State; that the petitioners' Petition for a Rehearing was denied on May 27, 1952; that the Federal question heretofore pointed out has been involved in this case since its inception and that the District Court of Caddo County.

Oklahoma, and the Supreme Court of the State of Oklahoma undertook to base their decisions herein on decisions of this Court.

The petitioners are without right of a review of the decision by the Supreme Court of Oklahoma by appeal (*Oklahoma Tax Commission* v. *Magnolia Petroleum Co.*, 333 U.S. 870) and for said reason relief is sought under this Petition.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued by this Court to the Supreme Court of the State of Oklahoma for the purpose of reviewing said court's decision of April 29, 1952.

Respectfully submitted,

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JULY, 1952.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

At Pages 3 to 7 of our Petition for a Writ of Certiorari we stated what we believe to be the pertinent facts and for the sake of brevity we will not restate the facts in this Brief.

We do wish to suggest however that *Mills, Oklahoma Indian Land Laws*, 2nd Ed., serves as a convenient reference to the General Allotment Act and the amendments thereto. See Sections 1118 to 1158, pp. 743 to 763 thereof.

As pointed out in our Petition for a Writ of Certiorari, the Federal question presented by this proceeding is whether or not the interest of a non-Indian devisee or heir in lands allotted under the General Allotment Act, is, as a Federal instrumentality, impliedly immune under the Constitution of the United States from ad valorem taxes.

In its opinion herein the Supreme Court of Oklahoma answered the above question in the affirmative and held that Juana Paukune's undivided one-third interest in the allotment of Pau-kune, an Apache Indian, which interest she took as Pau-kune's non-Indian devisee and not as his heir is, as a Federal instrumentality, impliedly exempt from ad valorem taxes.

The syllabus of the opinion, which under the provisions of Section 977, Title 12, O.S. 1951, as construed

in *Corbin* v. *Wilkinson*, 175 Okl. 247, 52 P. 2d 45, became the law of the case, is quoted at length at Page 2 of our Petition for a Writ of Certiorari. The substance of the syllabus is that (a) restrictions against alienation imposed by the fifth section of the General Allotment Act run with the land and are binding on non-Indian "heirs"; (b) the provisions of said Section of the General Allotment Act to the effect that the United States Government will convey allotted lands at the end of the trust period free of all encumbrances imposed an obligation to keep allotted lands free of State taxation in the hands of non-Indian "heirs," and (c) the interest of a non-Indian "heir" in land allotted under the General Allotment Act is not subject to ad vaorem taxes during the trust period.

In the body of the opinion the court points out that a Trust Patent was issued to Pau-kune in 1901; that Pau-kune died testate in 1919; that under Pau-kune's will his wife Juana Paukune, who was carried on the Department of the Interior's record as a Mexican, took an undivided one-third interest in Pau-kune's allotment and their son, Jose, took the remaining undivided two-thirds; that the trust period provided for in the General Allotment Act had been extended; that a fee patent has not been issued to either Pau-kune or Juana Paukune; that it is immaterial whether Juana Paukune is an Indian or non-Indian because the provisions of the first

paragraph of the fifth Section of the General Allotment Act (which paragraph is quoted at length at Page 8 of our Petition for a Writ of Certiorari) applies to non-Indian heirs as well as Indian heirs.

The court then goes on to cite *Reed* v. *Clinton*, 23 Okl. 610, where it was held that a non-Indian heir's interest in land allotted under the General Allotment Act cannot be alienated: *United States* v. *Thurston County, Nebraska et al.* (C.C.A. 10), 143 F. 287, where the court held that the proceeds of the sale of lands allotted to Omaha and Winnebago Tribes were impliedly exempt in the hands of Indian heirs from taxation; *Childers* v. *Beavers*, 270 U.S. 355, where this Court held that Quapaw estates were not subject to an Oklahoma inheritance tax; *United States* v. *F. H. Reily*, 290 U.S. 33, where this Court held that restrictions against alienation imposed on Kickapoo allotments run with the land and are binding on Indian heirs, and concludes that *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, where this Court held that restrictions imposed by the Osage Allotment Act there involved (34 Stat. 539) were not binding on non-Indian heirs, "is not in point for the reason that it involved an Osage Tribe allotment and this Tribe was expressly excepted from the General Allotment Act."

It is patent that the Osage Allotment Act and the General Allotment Act must vary in some particular that

can be said to be pertinent to the question under consideration before the fact that the Osages were excluded from the latter Act can be considered of any significance. While the Supreme Court of Oklahoma did not undertake to point out what it considered the difference to be, it is obvious that it thought that under the Osage Allotment Act the United States did *not* hold any of the properties of the Osages in trust for Indian heirs and that said properties were *not* restricted in the hands of such heirs. In so concluding, as is made clear in the following cited cases, the court was unquestionably mistaken.

In the comparatively recent case of *West* v. *Oklahoma Tax Commission*, 334 U.S. 717, this Court, after reviewing a number of its earlier decisions, held that legal title to an Osage headright and Osage trust properties in the hands of an Osage heir is in the United States Government and that such properties are restricted in the hands of such an heir.

In *McCurdy* v. *United States*, 264 U.S. 484, 486, this Court held that the lands of the Osages in the hands of the allottees were impliedly immune from ad valorem taxes levied by Osage County, Oklahoma, during the period that the United States Government holds same in trust, which is the basis of the opinion in the instant case.

It is interesting to note that in its opinion in the *Levindale case, supra*, reported in 43 Okl. 13, 140 P.

607, the Supreme Court of Oklahoma cited *W. H. Aaron* v. *United States*, 183 F. 347, which case involved an Osage allotment, as authority sustaining its decision to the effect "that the restrictions upon alienation imposed by the above Act (Osage Allotment Act, 34 Stat. 539) attach to and run with the land, and the inability to convey disqualifies the white heir as well as the immediate Indian allottees." The court held that the interest of Coleman, a white man, in properties inherited from his Osage Indian wife and son was restricted and for said reason he could not convey same and the court so held notwithstanding the fact that the heir involved in the *Aaron case* was full-blood Osage Indian.

As heretofore suggested, Levindale Lead & Zinc Mining Co. perfected an appeal from the aforesaid Judgment of the Supreme Court of Oklahoma to this Court. In reversing the Supreme Court of Oklahoma the following rule was laid down at Page 437 of 241 U.S.:

> "The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute. *It was a policy relating to the welfare of Indians — wards of the United States.* The establishment of restrictions against alienation 'evinced the continuance, to this extent, at least, of the guardianship which the United States had exercised from the beginning.' *Heckman* v. *United States*, 224 U.S. 413, 436, 56 L. ed. 820, 829, 32 Sup. Ct. Rep. 424; *United States* v. *Kagama*, 118 U.S. 375, 384, 30 L. ed. 228, 230, 6 Sup. Ct. Rep. 1109; *United States* v. *Rickert*, 188 U.S. 432, 437, 438, 47 L. ed. 532, 536, 23 Sup. Ct. Rep.

478; *Marchie Tiger* v. *Western Invest. Co.*, 221 U.S. 286, 316, 55 L. ed. 738, 749, 31 Sup. Ct. Rep. 578; *Williams* v. *Johnson*, 239 U.S. 414, 420, 60 L. ed. ____, 36 Sup. Ct. Rep. 150. *This policy did not embrace white men—persons not of Indian blood—who were not as Indians under national protection, although they might inherit lands from Indians; and, with respect to such persons, it would require clear language to show an intent to impose restrictions*" (Italics ours).

The above quoted rule has never been departed from by this Court and has been repeatedly and consistently followed by other courts.

In *Taylor* v. *Jones* (C.C.A. 10), 51 F. 2d 892, 893, the court held that an Osage headright inherited by a Kaw was inalienable, but was alienable in the hands of a non-Indian. We quote from the page indicated:

"* * * Congress has the same power over her and her property as it has over an Osage; doubtless the same considerations of public policy that prompted Congress to withhold from Osages the right to alienate these headrights, prevailed as to Indians of other tribes. *The distinction drawn by Congress between Indians and non-Indians is a rational one*, for as Chief Justice Hughes said in *Levindale Lead Co.* v. *Coleman*, 241 U.S. 432, 437, 36 S. Ct. 644, 646, 60 L. ed. 1080, in speaking of the policy back of the Osage Act of 1906 (34 Stat. 539), 'This policy did not embrace white men—persons not of Indian blood—who were not as Indians under national protection, although they might inherit lands from Indians; and, with respect to such persons, it would require clear language to show an intent to impose restrictions.' But whatever the reason, Congress was careful to limit the authority to non-Indians, and we cannot extend it" (Italics ours).

In *Unkle v. Wills* (C.C.A. 8), 281 F. 29, 35, the court held that the *Levindale case* applied to the lands of the Quapaws (a tribe not mentioned as being excluded from the terms of the General Allotment Act) for the reason that the rationale of the *Levindale case* applied to all Indian Tribes. We quote from the case at the page indicated:

> "The twenty-seventh assignment is that the court erred in its finding that Mrs. Unkle is a white woman. The undisputed evidence establishes that fact. It was clearly admissible, as plaintiff contended that the deed and stipulations of compromise were void for the reason that they had not been approved by the Secretary of Interior. Mrs. Unkle being a white woman, this contention is without merit. *Levindale Lead Co.* v. *Coleman*, 241 U.S. 432, 437, 36 Sup. Ct. 644, 60 L. ed. 1080; *Mixon* v. *Littleton*, 265 Fed. 603, 605, decided by this court. *Although in neither of these cases were Quapaw Indian allotments involved, the reasoning applies to all Indian allotments.* As said in *Levindale Lead Co.* v. *Coleman* * * *" (Italics ours).

Following the above quotation, the court quotes that portion of the *Levindale case* which we have heretofore quoted.

In *Mixon* v. *Littleton* (C.C.A. 8), 265 F. 603, 606, the lands of a Sac and Fox were involved. At the page indicated the court had this to say:

> "* * * As Julia Mixon as a white woman, with no Indian blood, was not included in the policy of national protection against the making of conveyances of allotted lands by Indians, and as there was no express restriction against her conveyance of her property, no reason is perceived why she could not

> convey her expectancy of receiving a patent and to do so by giving a warranty deed. * * *"

Preceding the above quoted matter, the court quotes that portion of the *Levindale case* which we have heretofore quoted.

In *Taylor* v. *Irwin* (C.C.A. 10), 60 F. 2d 495, 497, the court had this to say in connection with an Osage headright:

> "* * * (b) That the policy of the government was to conserve the headrights for the support of the Indians, and to protect them against their own improvidence, a policy which has no application to whites. *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, 36 S. Ct. 644, 60 L. ed. 1080; *Pettit* v. *Commissioner* (C.C.A. 10), 38 F. (2d) 976. * * *"

The court held that headrights in the hands of non-Indians were not restricted and passed to the non-Indian owners' trustee in bankruptcy. As heretofore pointed out this Court holds that the Federal Government holds title to the headrights of the Osage in trust.

The fourth paragraph of the syllabus in the case of *Cook* v. *First National Bank of Pawhuska*, 145 Okl. 5, 8, 291 P. 43, reads as follows:

> "A non-citizen white man who inherits a 'headright' from his enrolled Osage Indian wife takes the same without restriction. The Secretary of the Interior, under the Act of Congress passed April 12, 1924 (43 Stat. L. 94), has no authority, as a condition prerequisite to his approval of a sale of this 'headright,' to require the owner thereof to give a portion of the moneys received from the sale to his minor Indian children."

At the page indicated the Court had the following to say on the issue under discussion:

> "* * * This property owned by him, a white man, was unrestricted unless made so by the Act of April 12, 1924. *Mixon* v. *Littleton* (C.C.A. Eighth Cir.), 265 Fed. 603; *Levindale* v. *Coleman, supra. The government has no policy of supervising white men in their commercial transactions, has no policy to restrain its citizens from free and full activity in barter and trade.* Unless it was the clear intent of Congress to adopt a policy of restricting the citizens of the United States in barter and trade, no such intent will be presumed. *McCurdy* v. *U. S., supra; Chouteau* v. *Com'r of Internal Revenue* (C.C.C.A. Tenth Cir.), 38 Fed. (2nd) 976; *Mixon* v. *Littleton* (C.C.A. Eighth Cir.), 265 Fed. 603; *Levindale* v. *Coleman, supra* * * *." (Italics ours).

In *Johnson* v. *United States* (C.C.A. 10), 64 F. 2d 674, 676, the court disposes of Juana Paukune's argument to the effect that restrictions ran with Paukune's allotment and for said reason the land is restricted in her hands as his devisee, by pointing out that such was not the intent of Congress where land passes to a non-Indian. We quote from the case at the page indicated:

> "If the question were an open one, we would agree with the contention of appellant. The word 'inalienable' contained in the proviso is not adamantine. The Osage statute (34 Stat. 539) provides that the homestead of an Osage 'shall be inalienable' until otherwise provided by Act of Congress. In *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U.S. 432, 36 S. Ct. 644, 646, 60 L. ed. 1080, the facts were that a white man had inherited an interest in an Osage homestead, and the argument

> was made there, as here, *that he could not alienate his interest because the restriction ran with the land. The Supreme Court held that the restriction should be construed as running 'only according to the intendment of the statute.'* It was held that the restriction should be construed in light of the general policy of the United States in its dealing with Indians, a policy which did not include persons of non-Indian blood within its scope. The court upheld a conveyance by the non-Indian which was not approved by the Secretary of the Interior, saying in part: * * *" (Italics ours).

In *Drummond* v. *United States*, 131 F. 2d 568, 570, an Osage and an Otoe took an interest in the lands of a Kaw under the latter's will. It was contended that since the devisees were of a different tribe than the testator, the lands passed to the devisees unrestricted. In denying this contention, the court stated that the argument would be sound if the devisees were non-Indians but wasn't sound since the devisees were Indians and therefore of a class that Congress sought to protect. We quote from the opinion at the page indicated:

> "* * * The restrictions were imposed for the benefit of Indians, not white people, *and would serve no purpose when the lands passed into the ownership of white men.* Congress was concerned with the protection of all Indian heirs under guardianship of the United States, whether members of the Kaw Tribe or other tribes. * * *" (Italics ours).

The reason for exempting the lands of restricted Indians from taxes is stated in *United States* v. *Rickert*, 188 U.S. 432:

"* * * These Indians are yet wards of the nation, *in a condition of pupilage or dependency, and have not been discharged from that condition.* They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the Act of 1887, and the agreement of 1889, ratified by the Act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race. * * *" (Italics ours).

The reason given by the Supreme Court in the *Rickert case* and those cases which follow that case is unquestionably without application where a non-Indian is involved, all for the reason that the Federal Government does not even pretend to have any right, title or interest in an allotment which has passed to a non-Indian.

In *Schock* v. *Sweet*, 45 Okl. 51, 58, 145 P. 388 (affirmed 245 U.S. 192), the court, in rejecting the asserted claim of a non-Indian grantee to an exemption from ad valorem taxes, had the following to say at the page of the report above indicated:

"So it will be seen that the decision in *Choate* v. *Trapp, supra*, could not have reasonably been otherwise. But here we have an entirely different question; we are dealing with a different class of citizens and one that is entitled to no protection, save and except that protection which every other citizen of the United States is entitled to receive. The provision as applied to these citizens must be strictly construed against granting the tax exemption; and,

if we fail to find it granted in specific terms and expressed in language about which there can be no doubt, the exemption does not exist. In other words, an exemption from taxation is never presumed; but in all cases of doubt as to the legislative intent, except where the rights of Indians are involved, the presumption is in favor of the taxing power. (Citing numerous cases from the United States Supreme Court.)"

At Page 61 of the Okl. Rep. (Vol. 45) the court observed that:

"* * * On the other hand, Congress could have had no purpose in protecting this property from taxation in the hands of speculators or other non-citizens of the tribes. It would have been an unjust, unnatural, and unwarranted discrimination, which the Federal Government has always studiously refrained from making. * * *"

The quoted observations of the Oklahoma Supreme Court are as apropos today as they were when made in 1914. As late as 1943 this Court pointed out in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 609, that:

"* * * Since Oklahoma has become a State, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totaled more than $125,000,000. * * *."

We are hopeful that this loss will not be added to by exempting the interest of non-Indians in allotted lands although such lands may be exempt in the hands of the allottee or his Indian heirs.

In passing we wish to point out that *Reed* v. *Clinton*, 23 Okl. 610, 101 P. 1055, which case the Supreme

Court of Oklahoma treated as being conclusive on the question under discussion, was handed down May 21, 1909, while the *Levindale case* was handed down June 5, 1916, but that irrespective of the time element of said opinions the opinions of this Court control questions of Federal law.

In its opinion the Supreme Court of Oklahoma also cites Par. 354, p. 348, of *Mills, Oklahoma Indian Land Laws*, 2nd Ed., to the effect that restrictions imposed by the General Allotment Act are binding on non-Indian heirs as well as Indian heirs. The only authority cited by Mills is *Reed* v. *Clinton, supra,* and therefore the citation of Mills in said opinion does not represent authority in addition to the *Reed case.*

The case of *Childers* v. *Beavers*, 270 U.S. 333, cited by the Supreme Court of Oklahoma as sustaining its decision herein was overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376; *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 603, and *West* v. *Oklahoma Tax Commission, supra.*

JUANA PAUKUNE IS A DEVISEE AND NOT AN HEIR

The right of Pau-kune to alienate his allotment by the will under which Juana Paukune took an undivided one-third of his allotment is found in an Act of February 14, 1913, 37 Stat. 678, 25 U.S.C.A. 373. Under said Act Pau-kune was free to disinherit Juana Paukune

if he so chose, *Blanset* v. *Cordin*, 256 U.S. 319, which means that Juana Paukune took her interest not as an heir but as a devisee. We add that if she had taken as an heir she would have taken an undivided one-half interest instead of an undivided one-third interest.

Sec. 213, Title 84, O.S. 1951.

The foregoing is significant when it is remembered that the General Allotment Act makes no reference to devisees or beneficiaries and, as heretofore pointed out, the Supreme Court of Oklahoma treated Juana Paukune as an heir and not as a devisee.

THE FACT THAT JUANA PAUKUNE HAS NOT RECEIVED A FEE PATENT IS WITHOUT SIGNIFICANCE

The fact that Juana Paukune has not received a fee patent to her interest in Pau-kune's allotment is without significance. As the non-Indian devisee of Pau-kune, she owned an unrestricted undivided one-third interest in the allotment and for such reason could alienate same as freely as though the land had been other than allotted land.

In *Mixon* v. *Littleton*, *supra*, the court had this to say at Page 605 of 265 F.:

> "The Interior Department construed the Sac and Fox Allotment Act as authorizing the conveyance of the fee to Julia Mixon of her share in the allotted land, and the United States granted a patent to her for the portion involved in this suit. There is no clear language in the Allotment Act showing an in-

tent to impose restrictions upon her right to convey this land before the patent was issued. It is contended that there is no right to make a conveyance while the fee is held in trust and a patent has not issued, but it is now settled that the equitable interest in allotted land or lands held in trust may be conveyed where there is no restriction imposed. *Mullen* v. *United States*, 224 U.S. 448, 457, 32 Sup. Ct. 494, 56 L. ed. 834; *Goat* v. *United States*, 224 U.S. 458, 470, 32 Sup. Ct. 544, 56 L. ed. 841; *Doe* v. *Wilson*, 23 How. 457, 463, 16 L. ed. 584; *Crews* v. *Burcham*, 1 Black. 352, 356, 17 L. ed. 91."

In the *Mixon case* it is pointed out that the construction placed on Indian statutes by the Interior Department will be given weight, which is but a statement of the general rule applied by this and other courts, and for such reason the construction placed on the statutes treating with the Apaches by the Interior Department is important and possibly decisive. We turn to a discussion of that policy.

At R. 83-84 will be found W. B. McCown's letter under date of April 7, 1932, to S. A. Cook of Apache, Oklahoma. In this letter it is made clear that the Kiowa Indian Agency construed the Federal statutes as entitling Juana Paukune to a fee patent and that Mr. Cook "should advise her that something must be done as the Department is unwilling to hold her share in trust any longer as she has no Indian blood." In the same letter Mr. McCown stated that "Juana Paukune is a very hard person to deal with" and it is to be assumed that she refused to take a fee patent.

June 14, 1930, C. J. Rhoades, Commissioner of Indian Affairs advised John A. Buntin, District Superintendent in Charge of the Kiowa Indian Agency that "the Department has given several decisions and opinions in cases involving white heirs, in which it has been held that when Indian trust property passes by descent to a white heir, such property is freed from the trust" and that the non-Indian is entitled to a fee patent. In support of his statement, Mr. Rhoades cites the *Levindale case* and other cases. A copy of Mr. Rhoades' letter appears as Appendix II hereof. While this letter is not in evidence, we assume that Juana Paukune will have no objection to our making reference thereto for the reason that Mr. Hatcher as her attorney, stated at the trial in connection with the introduction in evidence of Mr. McCown's letter that "I don't have any objection because it sets out the policy of the Government" (R. 82) and Mr. Rhoades' letter merely elaborates on and explains in some detail the reasoning underlying the Federal Government's policy.

We are advised that under the present policy of the Secretary of the Interior there is but limited supervision of the affairs of Apaches and of the other tribes whose affairs are administered through the Kiowa Indian Agency at Anadarko, Oklahoma. It seems the agency at present merely serves the Indians in much the same way a bank serves a non-Indian.

A FEDERAL INSTRUMENTALITY IS GRANTED IMPLIED IMMUNITY FROM TAXES IN ORDER TO PROTECT THE FEDERAL GOVERNMENT

As shown, the United States Government has, through the Secretary of the Interior, disclaimed any right, title or interest in Juana Paukune's interest in Pau-kune's allotment and it is not claimed that a taking of said interest will hinder, obstruct or burden the Federal Government in any way in administering the affairs of the Apache Indians.

In *I. T. I. O.* v. *Board of Equalization of Tulsa County, Okla.*, 288 U.S. 325, 328, the oil company contended that its share of oil produced from restricted Indian lands was impliedly exempt from ad valorem taxes for the reason that it acted as a Federal instrumentality. In rejecting the contention so made the Court had the following to say at the page indicated:

> "* * * Such immunity as petitioner enjoyed as a governmental instrumentality inhered in its operation as such, and being for the protection of the Government in its function extended no further than was necessary for that purpose. The holding of the oil in question, which had been segregated and withdrawn from the restricted lands as petitioner's exclusive property, awaiting disposition at petitioner's pleasure, was for its sole advantage and cannot be said to be so identified with its operations as a governmental instrumentality as to entitle it to exemption from the general property taxes imposed by the State in return for the protection the State afforded. * * *"

In *Oklahoma Tax Commission* v. *The Texas Co. and Magnolia Petroleum Company*, 336 U.S. 342, the right of Oklahoma to impose a gross production tax on the properties of lessees producing oil and gas under departmental leases covering restricted Indian lands of the Apaches and other Indians allotted under the General Allotment Act was involved. In that case the Magnolia Petroleum Company conceded that its working interest in Juana Paukune's interest in the lands that is here involved was subject to tax. See Footnote 4, p. 345 of the U.S. Rep.

The following was pointed out in the *Texas case* at Page 365 of the U.S. Rep.:

> "* * * intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption. * * *"

In the *Mountain Producers case, supra* (303 U.S. 384-385), the following quoted rule of law was laid down:

> "In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled by extending the constitutional exemption from taxation of those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the government instrumentality, and there

is only remote, if any, influence upon the exercise of the functions of government. * * *"

RESTRICTIONS AGAINST ALIENATION WITHOUT MORE DO NOT RENDER THAT RESTRICTED EXEMPT FROM TAX

In its opinion in the instant case the Supreme Court of Oklahoma held that restrictions against alienation, without more, rendered Juana Paukune's undivided one-third interest in Pau-kune's allotment impliedly exempt from ad valorem taxes, which holding is flatly contrary to a long line of decisions by this Court, many of which are cited in *United States* v. *Hester* (C.C.A. 10), 137 F. 2d 145, 147, from which case we quote at the page indicated:

> "Restrictions against alienation, without more, do not render the restricted lands immune from the operation of the taxing laws of the State of Oklahoma. *Landman* v. *Commissioners*, 10 Cir., 123 F. 2d 787; *Superintendent* v. *Commissioners, supra*, Page 123 F. 2d at 421; *McCurdy* v. *United States*, 246 U.S. 263, 38 S. Ct. 289, 62 L. ed. 706; *Board of County Commissioners* v. *Seber*, 10 Cir., 130 F. 2d 663, affirmed 63 S. Ct. 920, 87 L. ed. ___; *Shaw* v. *Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 48 S. Ct. 333, 72 L. ed. 709; *Oklahoma Tax Commission* v. *United States, supra.*"

At the same page of the opinion the court pointed out that:

> "* * * It is pertinent to remember that the sovereign State of Oklahoma has plenary power to tax all property within its domain, unless specifically restrained by force of Federal law. Indians residing

> in Oklahoma are citizens of that State, and they are amenable to its civil and criminal laws. Their property, unless exempt, is subject to taxation in the same manner as property belonging to other citizens of that State. *Matter of Heff*, 197 U.S. 488, 25 S. Ct. 506, 49 L. ed. 848; *Goudy* v. *Meath*, 203 U.S. 146, 27 S. Ct. 48, 51 L. ed. 130."

The court goes on to hold, citing *Minnesota* v. *United States*, 305 U.S. 382, and *United States* v. *Alabama*, 313 U.S. 274, that the power to tax includes the power to sell the property taxed to satisfy the tax.

TAX EXEMPTIONS ARE NOT GRANTED BY IMPLICATION

The lands of the Apaches are not specifically exempted from tax by the General Allotment Act, or amendments thereto, or by any Congressional Act. Such lands in the hands of the Apache allottee or his Apache heir are, under the authority of *McCulloch* v. *Maryland*, 4 Wheat. 316; *United States* v. *Rickert*, and *McCurdy* v. *United States*, *supra*, impliedly exempt from tax, which exemption arises solely from the fact that the presence of a dependent Indian ward of the Federal Government brings about such a Federal instrumentality as to warrant a tax exemption.

Caddo County does not here seek to tax the interest of an Apache allottee or his heir or devisee and, to the contrary, seeks to tax the interest of a non-Indian, which means that the dependent Indian that has been

held to create a Federal instrumentality that is impliedly exempt from taxes just isn't present. In *Oklahoma Tax Commission* v. *United States*, *supra*, the following will be found:

> "This court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co.* v. *Helvering*, 307 U.S. 57, 60, 59 S. Ct. 692, 693, 83 L. ed. 1104. It has applied that rule to taxing Acts affecting Indians as to all others. * * *" (319 U.S. 606).

Further on in the opinion the Court pointed out that if estates of members of the Five Civilized Tribes were made exempt from estate taxes some of Oklahoma's citizens would pay more because such estates would pay nothing. Applying the Court's reasoning to this case Juana Paukune who is receiving as much from Caddo County and from the State of Oklahoma as any other non-Indian, should pay her just and fair portion of all taxes.

In *New York* v. *United States*, 326 U.S. 572, 581, it is pointed out that,

> "In the older cases the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity * * *."

which statement is borne out by *Buckstaff Bath House Co.* v. *McKinley*, 308 U.S. 358, and *Alabama* v. *King and Boozer*, 314 U.S. 1, and many other cases, some of which have heretofore been cited.

CONCLUSION

The interest of a non-Indian devisee or heir in the allotted lands of the Apaches is subject to a non-discriminatory ad valorem tax and the Supreme Court of Oklahoma erred in holding to the contrary.

Respectfully submitted,

R. L. LAWRENCE,
County Attorney of
Caddo County, Oklahoma,
Anadarko, Oklahoma;

R. F. BARRY,
Attorney for the
Oklahoma Tax Commission,
Oklahoma City, Oklahoma,
Attorneys for Petitioners.

JULY, 1952.

APPENDIX I

"Filed in Supreme Court of Oklahoma, Apr. 29, 1952, Andy Payne, Clerk.

"In the Supreme Court of the State of Oklahoma.

"Vernie Bailess, County Treasurer, Caddo County, Oklahoma; and W. B. Coleman, Assessor of Caddo County, Oklahoma, and Board of County Commissioners of Caddo County, Oklahoma, composed of Ted A. Jones, Frank Duncan and George D. Nixon, Plaintiffs in Error v. Juana Paukune, Defendant in Error. No. 34,547.

SYLLABUS

"1. The restrictions under the General Allotment Act and the amendment thereto, February 8th, 1887, c. 119, Section 5, 24 Stat. 389 (25 U.S.C.A. 348), run with the land and are applicable to it, not only in the hands of the allottee, but of his heirs as well, regardless of whether the heirs are of Indian blood or not.

"2. Interest of heir in land allotted by Trust Patent under General Allotment Act, February 8th, 1887, c. 119, Section 5, 24 Stat. 389 (25 U.S.C.A. 348), is not subject to ad valorem taxes during trust period.

"3. The undertaking of the United States Government in Trust Patent issued pursuant to General Allotment Act, February 8th, 1887, c. 119, Section 5, 24 Stat. 389 (35 U.S.C.A. 348), is to convey the lands at the end of the trust period free of all charge or encumbrance and imposes an obligation to keep the lands free from the burden or charge of State taxation, as well as of every other encumbrance.

"Appeal from District Court, Caddo County; L. A. Wood, Judge.

"Action by Juana Paukune against Vernie Bailess, County Treasurer, Caddo County, Oklahoma, and W. B. Coleman, Assessor of Caddo County, Oklahoma; and Board of County Commissioners of Caddo County, Oklahoma, composed of T. A. Jones, Frank Duncan and George D. Nixon. Judgment for the plaintiff, and defendants appeal. Affirmed.

"Frank Limerick, Co. Atty., Caddo County, and Brewster McFayden, Anadarko, for plaintiffs in error.

"Hatcher & Bond and J. F. Hatcher, Chickasha, for defendant in error.

"*Per Curiam.* This is an action by Juana Paukune to obtain an injunction to enjoin the County Assessor of Caddo County, Oklahoma, from listing and assessing real estate located in Caddo County for ad valorem taxes, and to permanently enjoin the County Treasurer of Caddo County from selling the land for delinquent taxes, striking said land from the tax rolls and enjoining the Board of County Commissioners of Caddo County from claiming any right, title or interest in the lands by reason of the levy and assessment of ad valorem taxes against same. The trial court granted the injunction, and the defendants appeal.

"The land in question was allotted and Trust Patent No. 951 issued to Pau-kune, an Apache Indian, dated August 25, 1901. The Trust Patent reads in part as follows:

> 'Now Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of the Act of Congress of February 8, 1887 (24 Stats. 388), Hereby Declares that it does and will hold the land thus allotted, subject to all the restrictions and conditions contained in said fifth section as modified by the

fifth article of the agreement ratified by said sixth section of the Act of June 6, 1900, for the period of twenty-five years, in trust for the sole use and benefit of the said Pau-kune, or in case of his decease, for the sole use of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.'

"Pau-kune died in 1919, and left a will, which was approved by the Secretary of the Interior, and probated, under which Juana Paukune, his wife, became the owner of an undivided one-third interest in the land and Jose Paukune, his son, became owner of the remaining two-thirds interest in the land. The land is oil producing and is being produced under a departmental lease insofar as the interest of Jose Paukune is concerned. Jose Paukune is enrolled and classed as an Indian. Juana Paukune is carried on the Department of the Interior records as not being an Indian, and is classified as a Mexican.

"It was stipulated that the trust period provided for in the Trust Patent had been extended and had not expired at the time of the trial. No patent had been issued to Pau-kune or to Juana Paukune or Jose Paukune. Juana Paukune had never requested the issuance of a patent to her covering her interest in the land. Juana Paukune testified that she was born in Mexico and that her father was an Indian; but that she did not know the tribe, but that they had tribes in Mexico, the same as in the United States.

"It is the opinion of this court that the question as to whether Juana Paukune is an Indian is, under the facts in this case, not material. Section 5 of the General Allotment Act of February 8, 1887, 24

Stat. 388 (380) mentioned in the Trust Patent issued to Pau-kune, which may be found at Page 746, §1124 of Oklahoma Indian Land Laws, Second Edition by Mills, reads as follows:

> 'Trust patent to allottees. (5) That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declared that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the President of the United States may, in any case in his discretion extend the period.'

"25 U.S.C.A. 348 is derived from Section 5 of the General Allotment Act of February 8, 1887, cited above.

"Section 8 of the General Allotment Act, which may be found at Page 750, Paragraph 1134 of Mills, Second Edition, Oklahoma Indian Land Laws, provides:

> 'Par. 1134, Certain tribes excepted from provisions of Act.-(8) That the provisions of this Act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osages, Miami and Peorias and Sacs and Foxes, in the Indian Territory, * * *' See 25 U.S.C.A. 339.

"The defendants contend that Juana Paukune is not an Indian and that consequently her interest in

the land is subject to ad valorem taxes although no patent has been issued to her, and that the exemption should be limited to Indian heirs of the deceased allottee. The language of the Trust Patent and of the law above stated do not make this distinction either expressly or by inference. It is stated in Mills, Oklahoma Indian Land Laws, Second Edition, Paragraph 354, Page 348, as follows:

> 'The restrictions under the General Allotment Act and amendment run with the land and are applicable to it, not only in the hands of the allottee, but of his heirs as well. Any attempted alienation of the land by the heir, or any beneficiary interested in it or its rents, or the profits accruing therefrom, during the trust period, is absolutely void. And such restrictions are applicable to the heirs, regardless of whether the heirs are of Indian blood or not.'

"In *Reed* v. *Clinton et al.*, 23 Okl. 610, 101 P. 1055, we had occasion to pass upon the validity of a conveyance by a white person who was an heir of an Indian allottee, and which white person was an adopted member of the tribe. Therein it was said:

> 'The only question involved in this case is as to whether or not the conveyance from the defendant in error, John Clinton, to the father of the plaintiff in error, was valid. Section 5 of the Act of Congress approved February 8, 1887 (24 Stat. 389, c. 119; 1 Supp. Rev. St., p. 535; 3 Fed. St. Ann., p. 494), provides: * * * The plaintiff in error insists that because the defendant in error is a white person, and not an Indian by blood, although he was a member by adoption of said tribe of Indians, such restrictions would not operate as to him, but that it was the intention of Congress not to include in the term "heirs" white persons, although members of said tribe. The clause "if any conveyance shall be made of the lands set

apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void,' when considered in connection with the entire section, is plain and unambiguous. We are not permitted to look at the purpose for which the statute may have been passed, with a view of overturning the plain terms of the statute as expressed.'

"In *United States* v. *Thurston County, Nebraska et al.* (Neb.), 143 Fed. Rep. 287 (C.C.A., 10th Circuit), the original allottees under the General Allotment Act died and their Indian heirs sold the inherited land with the consent of the Secretary of the Interior and the county sought to tax the proceeds. The court said concerning the lands sold:

'* * * The lands which were sold were held by the complainant in trust to preserve them for the exclusive use and benefit of the respective Indian allottees and their heirs until the expiration of 25 years from the respective dates of their allotments, and then to convey them to the allottees respectively or their heirs, "in fee discharged of said trust and free of all charge or incumbrance whatsoever." 22 Stat. 342, ch. 434, No. 6; 24 Stat. 389, ch. 119, No. 5. The undertaking to convey them at the end of the 25 years free of all charge or incumbrance imposed an obligation to keep them free from the burden or charge of State taxation, as well as of every other incumbrance. *U. S.* v. *Rickert*, 188 U.S. 432, 23 S. Ct. 478, 47 L. ed. 532.'

"In *Charles S. Childers, State Auditor of the State of Oklahoma, Appt.* v. *John Beaver and Benjamin Quapaw*, 270 U.S. 555, 70 L. ed. 730, it was stated:

'It must be accepted as established that during the trust or restrictive period Congress has

power to control lands within a State which have been duly allotted to Indians by the United States and thereafter conveyed through trust or restrictive patents. This is essential to the proper discharge of their duty to a dependent people; and the means or instrumentalities utilized therein cannot be subjected to taxation by the State without assent of the Federal government.'

"See, also, *United States* v. *F. H. Reily*, 290 U.S. 33, 78 L. ed. 154, wherein suit was brought by the United States to enforce its rights and regulations governing allotted Indian land held under a so-called trust patent issued pursuant to Section 5 of the General Allotment Act of February 8, 1887 (25 U.S.C.A. 348), wherein the court said:

> "It is settled, and is conceded, that a restriction on alienation such as is here shown is not personal to the allottee but runs with the land and operates upon the heir the same as upon the allottee. So it is apparent the heir's conveyance was void, unless in some way the restriction was removed before the conveyance was made.'

"Defendants stress the applicability of the case of *Levindale Lead & Zinc Mining Co. et al.* v. *Coleman*, 241 U.S. 432, 60 L. ed. 1080. This case is not in point for the reason that it involved an Osage tribe allotment and this tribe was expressly excepted from the General Allotment Act.

"Affirmed.

"This court acknowledges the services of Attorneys Charles E. Earnheart, James R. Eagleton and Milton R. Elliott, who as Special Masters aided in the preparation of this opinion. These attorneys were recommended by the Oklahoma Bar Association, approved by the Judicial Council, and appointed by the court.

"Halley, V.C.J., and Welch, Corn, Gibson, Davison, Johnson, O'Neal, and Bingaman, JJ., concur."

APPENDIX II

"UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

Jun 14, 1930

"L - S
28729 - 30

"Mr. John A. Buntin,
Dist. Supt. in Charge, Kiowa Agency.

"Dear Mr. Buntin:

"Receipt is acknowledged of your letter of May 26, 1930 in which you request a copy of the decision on the law under which restrictions are removed from property inherited from an Indian by a white man.

"In recent years the Department has given several decisions and opinions in cases involving white heirs, in which it has been held that when Indian trust property passes by descent to a white heir, such property is freed from the trust. By a decision dated March 1, 1921, in the case of Manuel Sanchez, a deceased white man, the Department held to this view, citing the court decision in the case of *Levindale Lead & Zinc Mining Company* v. *Coleman* (241 U.S. 432, 437-438). The decision of the court in this case is quoted in part as follows:

> 'The provisions of the Allotment Act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians—wards of the United States. The establishment of restrictions

against alienation "evinced the continuance, to this extent at least, of the guardianship which the United States had exercised from the beginning." * * * This policy did not embrace white men—persons not of Indian blood—who were not as Indians under national protection although they might inherit lands from Indians; and, with respect to such persons, it would require clear language to show an intent to impose restrictions.

"* * * But the fact that the non-member takes in the right of the deceased member is not enough to subject him to restrictions which are plainly imposed for the protection of members. It is urged that the restrictions, by virtue of their terms, were to run with the land until they expired by limitation or were removed (*Bowling* v. *United States*, 233 U.S. 528), but restrictions would not run with the land unless they had attached. And, even where they had attached, they would run only according to the intendment of the statute. We find no indication of an intent that they should apply to lands, or an interest in lands, which had come lawfully into the ownership of white men who were non-members of the tribe. * * *

"The view we have taken of the *ana*pplicability of the restrictions upon alienation in a case like the present finds support in the fact that there was no provision for giving to non-members certificates of competency. Under the seventh paragraph of Section 2, an "adult member" of the tribe, although a full-blood Indian, who could satisfy the Secretary of the Interior of his ability to transact his own business might obtain a certificate and thus be enabled to dispose of his "surplus land"; but a competent white man, not a member, could not be relieved. It would seem to be evident that

such an incongruous result was not intended, the language plainly showing that Indians alone were deemed to be subjected to the restrictions.'

"From the above it appears that restrictions on alienation imposed by acts of Congress run with the land and are binding upon the allottee and upon his heirs only so far as such restrictions affect Indian allottees and Indian heirs. The rule is therefore, that restrictions are released from Indian trust property taken by white heirs.

"Accordingly, the Department, in the *Sanchez case* ordered a fee patent to be issued for the unrestricted share which had been inherited by the white heir, and has recently suggested 'that it might be advisable to ask the Indian Office to consider whether it would not be a good plan to accompany those heirship cases involving white heirs with a prepared letter addressed to the Commissioner of the General Land Office directing the issuance of fee patents to such heirs covering their shares in the estates, which could be signed by the Secretary simultaneously with his action in the matter of determining the heirs to such estates. This would insure the issuance of fee patents to white heirs at the proper time, whose shares upon the death of the allottee go to them unrestricted.' The Office has been following this suggestion; but, in some cases where to remove restrictions from small undivided shares would greatly complicate the title to the property, efforts are being made to effect partitions.

"Other court decisions pertaining to restrictions on Indian trust property inherited by white persons are contained in *Kenny* v. *Miles* (250 U.S. 58), and *Mixon* v. *Littleton* (265 Fed. 603, 605-606).

Sincerely yours,

C. J. RHOADES,
Commissioner."